FYI

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Sent: Friday, October 14, 2005 11:21 AM
To: Planning Department
Subject: SIGN REGULATION BULLETIN FALL 05

SIGN REGULATION BULLETIN

Fall 2005

Published by Randal R. Morrison, Sabine & Morrison Attorneys, San Diego

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Quick read summaries of important new court decisions involving regulation of signs and billboards, public forum, government speech and other First Amendment topics.

U.S. SUPREME COURT - FIRST AMENDMENT CASES

The Court has refused to review ("denied certiorari") the following cases:

Inflatable Rat: The 6th Circuit upheld an injunction against the city's sign ordinance as applied to the display of an inflatable rat balloon, a symbol of labor protest, on a public sidewalk. *Tucker v Fairfield*, 398 F.3d 457 (6th Cir. 2005); cert denied 10/03/05 as *Fairfield v Tucker*, 2005 U.S. Lexis 7206.

Christian Art. A public school district did not engage in viewpoint discrimination when it refused to allow student art with a religious theme to remain on murals painted as part of a beautification project. *Barnon v School Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004); denied 10/03/05, 2005 U.S. Lexis 5505.

Leaflets on Vehicles. The 6th Circuit approved an ordinance prohibiting placing leaflets on private cars temporarily parked on public streets. The law made no distinction as to message content, and helped control littering. *Jobe v Catlettsburg*, 409 F.3d 261 (6th Cir. 2005), denied 10/06/05, 2005 U.S. Lexis 5830.

Deceptive email. WA state law prohibited transmission of commercial email that was deceptive or used a third party's domain name without permission; it applied equally in-state & out-of-state. The law did not did not violate the Commerce Clause of the federal constitution, per *State v Heckel*, 122 Wash.App. 60, 93 P.3d 189 (2005), cert denied 10/06/05 as *Heckel v Washington*, 2005 U.S. Lexis 5821.

Attorney's Free Speech. Attorney was cited for contempt of court during a criminal trial. Later,

out of court, he made a statement to a newspaper that the judge "had the judicial temperament of a barbarian." The State Bar imposed punishment, which was upheld by the State Supreme Court. *Mississippi Bar v Lumumba*, 2005 WL 613579, 2005 Miss. Lexis 175 (2005). Cert denied 10/06/05, 2005 U.S. Lexis 6085.

Legislative Prayer. A county government's policy which forbade a Wicca high priestess ("witch") from offering prayer before public meetings of the Board of Supervisors, while allowing prayers from religious leaders in the "Judeo-Christian monotheistic tradition," did not violate the Establishment (of religion) clause of the First Amendment, per *Simpson v Chesterfield County*, 404 F.3d 276 (4th Cir. 2005). Cert denied 10/11/05, 2005 WL 2493930.

Street preacher who was cited for violating city's noise ordinance did not challenge the citations; thus he had failed to exhaust administrative remedies and defaulted on his state court rights. These failures meant that the federal court would not hear his constitutional challenge to the noise ordinance. *Moore v City of Asheville NC*, 396 F.3d 385 (4th Cir. 2005), cert denied 10/3/2005, 2005 WL 2413957.

Confidential news sources. Newspaper and reporter were sanctioned for refusing to identify confidential sources; default damage judgments were entered against them. They claimed the sanctions and judgment constituted violation of their First Amendment and Due Process rights. *Ayash v Dana-Farber Cancer Inst.*, 443 Mass. 367, 822 N.E.2ds 667 (Mass. 2005), cert denied 10/03/2005 as *Globe Newspaper v Ayash*, 2005 WL 2414324.

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SIGNS AND BILLBOARDS - new court decisions

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Billboard Company Challenges to the Entirety of City Sign Ordinances

Most cases of this type involve similar fact patterns. A company which is in the outdoor advertising business (or claims that it wishes to enter the industry or local market) presents permit applications for new billboards. The permits are typically denied for violations of size and height rules and/or because the city has a ban on all new billboards, or restricts them to certain areas. Signco then files a lawsuit, usually in federal court, arguing that there are so many unconstitutional provisions in the sign ordinance that it cannot be enforced, and that, in the resulting "legal vacuum," all signs are legal and thus permits must be issued.

Since there is no doubt that a ban on new billboards is constitutional (*Ackerley v Krochalis*, 108 F.3d 1095 (9th Cir. 1997)), the first issue is whether the billboard company has standing to challenge portions of the city law which do not apply to it. If the sign ordinance is amended (as often happens), this leads to two more issues: does adoption of the new law moot the challenge to the old law, and did the applicant acquire vested rights to permits based on the law at the time of permit application?

Standing. Does a billboard company have "overbreadth standing," *i.e.*, the right to sue on behalf of other parties who are not in the case, and thus challenge parts of the sign ordinance that do not apply to its applications? In *Granite State Outdoor v Clearwater*, 351 F.3d 1112 (11th Cir. 2003), one panel of three judges said "No;" 19 months later, a different panel of three judges from the same court said "Yes," in *Tanner Adv v Fayette County*, 411 F.3d 1272 (11th Cir. 2005).
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Outdoor Media Group v. City of Beaumont CA **, 374 F.S.2d 881 (CD CA 2005). After suit was filed, city adopted new sign ordinance with complete ban on billboards. Held: entire case is moot. No vested rights; case dismissed.

Boulder Sign v. Boulder City NV **, 382 F.S.2d 1190 (NV 2005): City's new sign ordinance moots all claims for injunctive relief (*i.e.* court orders compelling issuance of permits), but damages claim remains open. Similar decision: *Lockridge v. Oldsmar FL*, MD FL No. 8:03cv1246, Order 9/27/05.

Covenant Media v. City of Huntington Park CA **, 377 F.S.2d 828 (CD CA 2005): Adoption of new sign ordinance moots motion for preliminary injunction barring enforcement of prior ordinance. Pf invited to file amended complaint. (Note: Signco has announced intention to dismiss the case but still seek an attorney's fee award under the "catalyst theory"/private attorney general statute. (see *Tipton-Whittingham v. City of Los Angeles*, 34 Cal.4th 604 (2004)).

Get Outdoors v. San Diego CA **, 381 F.S.2d 1250 (SD CA Civ. No. 03-1436, 8/5/05): Signco did not have third party ("overbreadth") standing to challenge provisions which did not apply to it; billboard ban was valid; sign ordinance did not give officials excessive discretion; size rules were severable. Summary judgment to city. (Notice of appeal filed.)

Get Outdoors v. City of Lemon Grove CA **, 378 F.S.2d 1232 (SD CA No. 03-CV-1 507, 7/14/05): Incompleteness of applications was never cured, even after detailed notice; before suit was filed, city adopted new sign ordinance (including "message substitution" provision); suit challenged only the prior law. New law moots entire case; state property law blocks claims of vested rights. Summary judgment to city. (Notice of appeal filed.) *Get Outdoors v. City of Chula Vista CA* **, (SD CA No. 03-cv-1506, Order granting summary judgment to City 9/30/05). Same reasoning and result as Lemon Grove.

Adcuntage Media and Hispanic Chamber of Commerce v. Hopkins MN, 379 F.S.2d 1030 (MN No. Civ 04-04959, 7/29/05): Pf had likelihood of success because the sign ordinance distinguished between real estate and political signs, and thus favored commercial speech over non-commercial; city law also favored granting permits to churches, synagogues, apartments, and civic organizations, to the exclusion of secular non-profits. Preliminary injunction granted.

Billboard moratorium. Action Outdoor submitted corrected applications for new billboards a few hours before city council adopted a moratorium on new billboards. City then granted a pre-moratorium application for Action's competitor, Lamar, to rebuild the face on a nonconforming sign. City then adopted a new sign ordinance banning all off-premise signs. Action's applications were then denied under both the old and new laws. Held: There is no indication the city will return to the old law; the new law moots the case. No vested rights under the prior law because the leases are contingent upon permits, and no permits have been issued. The applications did not conform to prior law, so reliance was not reasonable. Summary judgment to the city. *Action Outdoor v. Destin FL*, 2005 WL 2338804 (ND FL No. 3:03cv426, 9/23/05).

Offsite/Adult. Various adult businesses challenged MO state law which forbade offsite signs promoting such establishments. Pf's motion for preliminary injunction was denied because the law regulated only commercial speech by time, place and manner, *Passions Video v. Nixon*, 375 F.S.2d 866 (2/18/05); summary judgment granted to the State Attorney General, 2005 WL 1861967 (WD MO No. 04-0760, 8/2/05).

Billboard Visibility/"Taking". The California Supreme has unanimously agreed to review *Regency v Los Angeles****, formerly 126 Cal.App.4th 1281. Regency Outdoor claims that reduction of visibility of its billboards, resulting from the city's planting of mature palm trees along boulevard approaching Los Angeles International Airport, constitutes a taking which must be compensated. The Court of Appeal rejected the claim.

For a longer version of this newsletter, with more cases, click here.

PUBLIC FORUM AND GOVERNMENT SPEECH

Street as Public Forum: Salt Lake City's sale to LDS ("Mormon") Church of complete ownership in former public street, including formerly reserved public access easement, removed street from "traditional public forum;" the church could forbid all expressive activity on its private property. *Utah Gospel Mission v Salt Lake City Corp.*, 2005 WL 2421618, 2005 US App. Lexis 21396, 10th Cir. No. 04-4113, 10/03/05. Earlier decision in same dispute: *First Unitarian v SLC*, 308 F.3d 1114 (10th Cir. 2002).

Public Art Project. District of Columbia sponsored "largest public art project in the history" of DC, consisting of preformed sculptures of animals representing major political parties, displayed on public and private property. Artists were invited to decorate the models with creative, humorous art. Guidelines: no direct advertising, no social disrespect or inappropriate images. PETA's designs, including "animals are not ours to eat, wear, experiment on, or use for entertainment" and " The Circus is coming... See Torture, Starvation...," was rejected as political and inconsistent with the theme. DC Circuit: The compilation of speech of third parties is a communicative act. As a speaker and patron of the arts the government is free to communicate some viewpoints while disfavoring others. The free speech clause does not apply to the government as communicator. *People for the Ethical Treatment of Animals v Gittens*, 414 F.3d 23 (DC Cir. 07/05/05).

Protests on freeway overpasses (3 cases)

1. Abortion. Protestor displayed a banner on a highway overpass, visible to motorists below. Police asked her to stop; she sued. Denver claimed unwritten policy, well known and consistently enforced, forbidding all signs and banners on overpasses. Held: Protestor has not shown likely chilling effect on third parties who are not before the court. Even though policy was unwritten, protestor knew it applied to her and all others. Summary judgment must be granted to city. *Denver v Faustin*, 2005 WL 2235435 (10th Cir. No. 04-1025, 9/15/05); previous case involving same protestor: 268 F.3d 942).

2. Homosexuality: Christian minister Ovadal and others protested homosexuality by displaying large signs and banners on a freeway overpass; angry drivers below began driving erratically, increasing traffic congestion. Police threatened arrest for disorderly conduct; pastor was later banned from protesting on any overpass. Held: A sidewalk does not lose status as "traditional public forum" when it crosses over a freeway. The city bans only those signs which cause a threat to public safety; police officers analyze "threat" on an ad hoc basis, depending on viewer's reaction. "The police must allow the speech and control the crowd; there is no 'heckler's veto'." Case returned to trial court to decide: is the city's rule – no overpass protests that cause traffic

hazards – capable of content-neutral application, or a "no Ovadal on overpasses" rule? *Ovadal v Madison WI*, 416 F.3d 531 (7th Cir. No. 04-4030, 8/8/05). Similar case involving the same minister: *State v Ovadal*, 234 Wis.2d 526; 611 N.W.2d 471 (2000).

3. Iraq War. State could not prohibit war protestors from displaying banners on overpass while allowing official flags in the same place. *Brown v California Dept. of Transp.*, 321 F.3d 1217 (9th Cir. 03).

Save the Chickens. Members of People for Ethical Treatment of Animals attempted to picket on a public sidewalk, protesting treatment of chickens, on Christmas Eve, near a church believed to be attended by officials of the owner of KFC. Police told them to move to other side of street. When sued, City moved to dismiss. Held: Claims dismissed: establishment clause violation, search and seizure, civil rights conspiracy; claims not dismissed: free speech violation, municipal liability. *Friedrich v Southeast Christian Church, Louisville KY*, 2005 WL 2333638 (WD KY, No. 3:04 cv 741, 9/22/05).

Commercial Festival at Courthouse. County rules required that sponsors of major events at courthouse have IRS non-profit tax status. Bennett, organizer of Arts and Crafts Festival, exchanged use of Volunteer Fire Dept's (VFD) non-profit tax number in exchange for a portion of the proceeds, and was granted permits for several years. Later, she and VFD parted ways; she then made a new deal with Fraternal Order of Police (FOP), and applied for a permit in FOP's name. Permit was given to her former partners, the VFD. She sued, alleging: "the County violated the First Amendment . . . by limiting event sponsors to non-profit organizations." FOP did not join in the suit. Held: The County simply chose between two non-profits. Bennett did not personally apply for permits, and was not personally denied a permit for lack of non-profit status. She has not been personally injured by the "non-profits only" rule, and thus has no standing. The case must be dismissed. *Bennett v Brownlow*, 119 P.3d 460 (AZ SC, No. CV-04-0215, 9/9/05).

Street event: art, commerce or incitement to violence? Graffiti artist turned fashion and video game designer applied to NYC for a street activity permit, which was granted as an art exhibit featuring mock subway cars with graffiti. Later, City became concerned the event might be a commercial promotional event for a new video game involving graffiti themes (which would require a higher permit fee), and revoked the permit. The artist then applied for a commercial event permit, which was rejected because of worries the graffiti on the mock subway cars would incite criminal behavior. Held: The City's "commercial" objection is a facade for its real concern: desire to censor the graffiti. By the City's logic, "a street performance of Hamlet would be tantamount to encouraging revenge murder. . . a street performance of Oedipus Rex, don't even think about it." Based on the artist's assurance that the event would not include any promotional material for the video game, the Court reinstated the original permit. *ECKO COMPLEX LLC v Bloomberg, Mayor of NYC*, 382 F.S.2d 627 (SD NY No. 05 Civ 7335, 8/22/05).

Disclaimer: The summaries in this newsletter necessarily simplify the facts, omit details, and ignore some issues. For a full understanding, read the entire court decision. Published for educational purposes only, not as legal advice. Reading this newsletter does not form an attorney client relationship.

Disclosure: on cases marked **, Randal R. Morrison served as special counsel to the starred party; on cases marked *** he wrote (or will write) or contributed to an amicus ("friend of the

court") brief in support of the starred party.

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